

## Buffalo Law Review

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Volume 9 | Number 1

Article 87

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10-1-1959

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Buffalo Law Review

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#### Recommended Citation

Buffalo Law Review, *Evidence—Evidence Obtained by Wire Tapping Admissible in New York Courts*, 9 Buff. L. Rev. 149 (1959).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol9/iss1/87>

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claiming that the provisions in her behalf were inadequate in that they were subject to diminution in favor of other beneficiaries, and that she was, therefore, entitled to elect under Section 18 of the Decedent Estate Law.<sup>66</sup> In order to answer this question, it was necessary for the Court to construe the husband's will. Having been denied the right to elect under Section 18, plaintiff then proceeded to petition for attorney's fees to be paid out of the estate. The Surrogate's Court of New York County allowed the petition. The Appellate Division reversed, but the Court of Appeals reinstated the Surrogate's decision.

Although a Section 18 proceeding usually does not come within the bounds of Section 278,<sup>67</sup> as those actions generally involve issues of status,<sup>68</sup> the Court held that where the question of the right of election turns upon the construction of the will, Section 278 will apply. In other words, the nature, rather than the caption of the proceeding, shall be the controlling factor. A lower court, on the same facts, has come to a like result.<sup>69</sup> It should also be noted that the Court handed down another decision on the same day as the present case was decided,<sup>70</sup> allowing Section 278 to apply where the original action was brought under a section not intended as will construction section, but in which a construction was needed for a determination of the issues.

The Court's holding is sound in the present case, for to hold otherwise might result in a multiplicity of suits. A party in plaintiff's position would first have to bring an action pursuant to Section 145 of the Surrogate's Court Act,<sup>71</sup> and after having the will construed, would then have to institute another action under Section 145-a for a determination of the validity of plaintiff's right of election.<sup>72</sup> Surely such a result was not the intention of the legislature.

## EVIDENCE

### EVIDENCE OBTAINED BY WIRETAPPING ADMISSIBLE IN NEW YORK COURTS

The defendant in *People v. Variano*<sup>1</sup> was convicted of bookmaking in the Village of Tarrytown after the interception of certain telephone conversations by police officers acting with a court order issued pursuant to section 813-a of the Code of Criminal Procedure.<sup>2</sup> The Westchester County Court, reversing

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66. Section 18 of the New York Decedent Estate Law provides, generally, that where the surviving spouse is to receive less, under the will, than his intestate share, that spouse has the right to elect to take the difference between the amount bequeathed and the intestate share.

67. In re Curley's Estate, 161 Misc. 391, 293 N.Y. Supp. 370 (Surr. Ct. 1936).

68. In re Zweig's Estate, 145 Misc. 839, 261 N.Y. Supp. 400 (Surr. Ct. 1932).

69. In re Schnitzer's Will, 14 Misc. 2d 895, 125 N.Y.S.2d 578 (Surr. Ct. 1953).

70. In re Folsom's Estate, 6 N.Y.2d 886, 190 N.Y.S.2d 381 (1959).

71. *Supra*, note 62.

72. *Supra*, note 65.

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1. 5 N.Y.2d 391, 185 N.Y.S.2d 1 (1959).

2. The conviction was under § 986, New York Penal Law. The Code of Criminal Procedure provides that a justice of the Supreme Court or judge of a county court or of the Court of General Sessions of the County of New York may issue an *ex parte*

the trial court conviction,<sup>3</sup> felt the Court of Appeals should review the New York rule on the admissibility of wire-tap evidence in the light of the recent Supreme Court decision in *Benanti v. United States*.<sup>4</sup> The Court of Appeals held, however, that the evidence acquired by wire tapping was admissible even if it violated the Federal Communications Act.<sup>5</sup> It reversed the order of the County Court and remitted the matter to that Court to pass on the facts.<sup>6</sup>

The *Benanti* case held that wire-tap evidence obtained by New York policemen under Section 813-a was not admissible in a Federal court.<sup>7</sup> The Supreme Court made it clear that wire tapping, even though permitted by state law and authorized by the court, was still a violation of Section 605 of the Federal Communications Act.<sup>8</sup> The Court did, however, reaffirm the rule of *Schwartz v. Texas*,<sup>9</sup> which acknowledges the right of a state to determine its own rules of evidence.

The Court of Appeals did not think it necessary to discuss the impact of *Benanti*. It ruled that, even assuming the wire-tap evidence was illegally obtained, the *Benanti* case had no effect on its admissibility because of the New York rule of evidence which permits the admission of illegally obtained evidence.<sup>10</sup> Although at least one lower court judge felt the *Benanti* decision invalidated Section 813-a,<sup>11</sup> this decision reaffirms the position of the New York Court of Appeals which allows the introduction of evidence garnered by wire tapping with a court order despite the provisions of the Federal Communications Act.<sup>12</sup>

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order for the interception, overhearing or recording of telephonic communications if he is satisfied that there is reasonable ground to believe that evidence of crime may be thus obtained.

3. See *People v. Dinan*, 15 Misc. 2d 211, 172 N.Y.S.2d 496 (County Ct. 1958).

4. 355 U.S. 96 (1957).

5. . . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. . . .

47 U.S.C. § 605.

6. 5 N.Y.2d 391, 396, 185 N.Y.S.2d 1, 4 (1959).

7. *Supra* note 2.

8. . . . we find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy.

355 U.S. 96, 105 (1957).

9. 344 U.S. 199 (1952). The Supreme Court therein held that the federal prohibition against the unauthorized interception of a telephone communication and divulgence of its contents did not render inadmissible evidence obtained in violation thereof in a state criminal trial.

10. *People v. Richter Jewelers*, 291 N.Y. 161, 51 N.E.2d 690 (1943); *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926).

11. In *re* Telephone Communications, 9 Misc. 2d 121, 170 N.Y.S.2d 84 (Sup. Ct. 1958). The Special Term, Samuel H. Hofstadter, J., issued this memorandum to apprise enforcement and prosecuting officers that all wiretaps, whether "authorized" or not, are illegal, and that henceforth any application for an order "authorizing" interception of telephone messages within New York would have to be denied, notwithstanding § 813-a of Criminal Procedure.

12. *People v. Stemmer*, 298 N.Y. 728, 83 N.E.2d 141, *aff'd* 336 U.S. 963 (1949); *Harlem Check Cashing Corp. v. Bell*, 296 N.Y. 15, 68 N.E.2d 854 (1946).